



Commonwealth of Kentucky
Finance and Administration Cabinet
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Steven L. Beshear
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Jonathan Miller
Secretary

September 24, 2010

No. 10-22

Jon Daugherty
Branch Manager
Oracle Elevator
4523 Knopp Avenue
Louisville, KY 40213

RE: Determination of Protest: RFB 785 1000000897 (Elevator Full Maintenance Various Parks).

Dear Mr. Daugherty:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest to the award of RFB 785 1000000897 for Elevator Full Maintenance Various Parks (the "RFB"). In its protest, Oracle Elevator contends that the awarded bid should have been determined to be non-responsive. For the reasons stated herein, this protest is sustained.

FACTUAL BACKGROUND

The Division of Engineering and Contract Administration, Department For Facilities and Support Services ("DECA") issued the RFB on May 13, 2010. The RFB sought bids for elevator, chair lift, and dumbwaiter maintenance at specified state parks and facilities. The RFB required the bidder to provide a price (85 points) and a response time (15 points). For response time, the RFB provided:

Response Time (15 points) — The successful contractor is required to respond at the work site location to call back situations within four (4) hours after notification. The bidder with the fastest response time will receive 15 points. The bidder with the next fastest response time will receive points by dividing the fastest time by the next fastest time and multiplying that percentage by the available points. For example, assume bidder "A" guarantees to respond to call back situations at the work site within 1 hour after notification, then he will receive 15 points ($1/1 = 1.00 \times 15 = 15$). Assume bidder "B" guarantees to be at the work site within 2 hours after notification, then he will receive 8 points ($1/2 = 0.50 \times 15 = 7.5 = 8$), etc. Bidders with response time greater than 4 hours shall be

considered non-responsive to the solicitation. Response time of 4 hours will receive zero "0" points.

Bidder's fastest response time at the work site after notification _____ days.

(Must be completed by bidder to be considered) (Failure to insert a number may invalidate your bid response.) DO NOT BID WORKING DAYS.

The RFB closed on May 27, 2010 at which time the bids were publicly opened. Four vendors submitted bids: DC Elevator; Steffen Elevator; Oracle Elevator; and Abell Elevator. DC Elevator bid a response time of "1 hour" in the space provided. Steffen Elevator bid "3 hours" on the bid form. Oracle Elevator bid "3 hours." The bid of Abell Elevator proposed the following for response time:

Bidder's fastest response time at the work site after notification: 1.5 days.
(Must be completed by bidder to be considered) (Failure to insert a number may invalidate your bid response.) DO NOT BID WORKING DAYS.

On or about June 1, 2010, DECA requested that Abell Elevator provide a "clarification" of its proposed response time. Soon thereafter, Abell Elevator provided the following:

"1.5" bid in the response time on page 23 of the original bid document means 1.5 hours in lieu of the 1.5 days.

Thereafter, DECA prepared a written Determination and Finding on June 21, 2010 which awarded Abell Elevator the highest number of points (95 points) and Oracle Elevator the second highest score (67 points). Abell Elevator had bid an annual cost of \$26,124; Oracle Elevator bid an annual cost of \$39,120. DECA contends that it was "reasonable, prudent, and in the best interests of the Commonwealth" to allow Abell Elevator to clarify its bid since its bid amount was lowest. The award to Abell Elevator was posted on the eProcurement website on July 13, 2010. Oracle Elevator filed a written protest on July 14, 2010.

In its July 14, 2010 protest, Oracle Elevator asserts that bid of Abell Elevator was non-responsive. In specific, Oracle Elevator alleges:

The company awarded this bid did not follow the proper means for response time and therefore per your specifications should have been deemed non-responsive (please see the underlined verbiage on the attached page from the specification). It states "Bidders with response time great than 4 hours shall be considered non-responsive to the solicitation." The said bidder that was awarded this contract stated that their response time will be 1.5 days which does not fall under the 4 hour specification of the bid package.

On July 26, 2010, Abell Elevator responded to the protest. Abell Elevator states:

It was Abell Elevator's full intention to provide a 1.5 hour response time in accordance with the bid documents. I understand this is what the specifications call for, it was never our intent to provide anything beyond the requirements of the specifications. I did not realize there was a typo on the bid form and that it stated days instead of hours until I was notified by Mr. Bumpous of the discrepancy. Our actual response time was clarified in a letter to Mr. Bumpous on 6-1-10.

On July 29, DECA filed a written response to the protest.

DETERMINATION

After a review of the solicitation, the solicitation responses, the applicable statutes and regulations, and other relevant information, the Secretary of the Finance and Administration Cabinet ("Secretary") finds and determines as follows:

Any actual or prospective bidder who is aggrieved in connection with the solicitation or selection for award of a contract may file a protest with the Secretary. KRS 45A.285. Oracle Elevator was an actual bidder to the RFB so it has standing to protest the award.

A protest to an award must be made within two (2) calendar weeks within the date the protestor knew or should have known of the grounds for protest. KRS 45A.285. In this case, the award was official on July 13, 2010. Oracle Elevator filed its protest on July 15, 2010. The Secretary finds that the protest was filed within 2 calendar weeks of the date the protestor knew or should have known of the grounds for protest. This protest, accordingly, is timely.

This procurement was conducted as "competitive sealed bidding" under KRS 45A.080. The hallmark of "competitive sealed bidding" is the general mechanical (that is non-discretionary) nature of the award. *Compare* KRS 45A.080 (competitive sealed bidding award to the responsible, responsive bidder whose bid offers a pre-defined "best value") *with* KRS 45A.085 (competitive negotiation award "to the responsible offeror whose proposal is determined in writing to be the most advantageous to the Commonwealth, taking into consideration price and the evaluation factors set forth in the request for proposals.") In general, procurement under Kentucky's Model Procurement Code ("KMPC") is by "competitive sealed bidding." KRS 45A.080. This process utilizes a Request for Bids or RFB. In competitive sealed bidding, the contract will be awarded to the responsible bidder whose bid is responsive and determined to be "best value."

One of the key factors distinguishing sealed bidding from negotiated acquisition is the requirement for the public opening of all bids at the time and place stated in the Request for Bids. *Compare* 200 KAR 5:306(2) *and* KRS 17.080(2) (Competitive Sealed Bidding) *with* 200 KAR 5:307 (Competitive Negotiation). The purpose of the public bid opening requirement is to protect the public and the interest of the bidders against

fraud, favoritism or partiality in the letting of contracts, and to enable competing bidders to verify whether other bids are responsive. *Bartomeli Co., Inc.*, Comp Gen Dec B-246060, 92-1 CPD 170 (Comp. Gen. Feb. 10, 1992).

A competitive sealed bid is “responsive” if it conforms in all material respects to the invitation for bids. KRS 45A.070(7). Responsiveness is determined at bid opening. *Interstate Rock Products v. U.S.*, 50 Fed.Cl. 349, 360 (Fed.Cl. 2001). A non-responsive bid cannot be cured after bid opening. *Id.* A determination of responsiveness must be made with information contained in the bid document at bid opening only. *Firth Const. Co., Inc. v. U.S.*, 36 Fed.Cl. 268, 272, 275 (Fed.Cl. 1996); *but compare* 200 KAR 5:306(3) (purchasing officer may seek post bid-opening “clarification” of matter contained in bid) *with Central States Bridge Co.*, 85-2 CPD ¶ 154 (Comp.Gen. 1985) (“A bid which is nonresponsive on its face may not be changed, corrected, or explained by the bidder after bid opening.”). An agency may waive minor irregularities in a bid. 200 KAR 5:306(4). This determination is discretionary, within limits. An irregularity is minor only if it does not provide the bidder with a competitive advantage. 200 KAR 5:306(4)(3).

The protester bears the burden of proof. *See Matter of: American Identification Products, Inc.*, 87-2 CPD ¶42 (Comp.Gen 1987) (“protester has burden of demonstrating the merits of its case.”); *GraphicData, LLC v. United States*, 37 Fed.Cl. 771, 782-83 (Fed.Cl. 1997); *CRC Marine Servs., Inc. v. United States*, 41 Fed.Cl. 66, 83 (1998). The burden is not met by the protester's mere disagreement with the agency's determination. *Systems & Processes Engineering Corp.*, 88-2 CPD ¶478 (Comp.Gen 1988). Moreover, a determination by an agency is entitled to a presumption of correctness. KRS 45A.280. The protestor must demonstrate the agency's action was arbitrary, capricious, or contrary to law. *Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007). The Secretary will only intervene only when it is clear that the agency's determination was irrational or unreasonable. *Baird Corp. v. United States*, 1 Cl.Ct. 662, 664 (1983). An “alternative interpretation” of the terms of the solicitation will not establish an arbitrary or capricious determination. *Laboratory Corp. of America v. Rudolph*, 184 S.W.3d 68, 74 (Ky.App. 2005). In sum, the Secretary will not substitute his judgment on such matters reserved to the discretion of the agency. *See Laboratory Corp. of America v. Rudolph*, 184 S.W.3d 68, 74 (Ky.App. 2005) (award of a negotiated procurement is a discretionary act by an agency); *Hensley v. City of Russell*, 2006 WL 2988174 (award of a public contract is a purely discretionary act).

In addition to showing that the agency's action was arbitrary or capricious or otherwise inconsistent with law, a protestor must show that the agency's action was prejudicial. *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed.Cir.1996) (“[T]o prevail in a protest the protester must show not only a significant error in the procurement process, but also that the error prejudiced it.”). To show prejudice, the protestor must demonstrate that there is a reasonable likelihood that, absent the error or violation of law, it would have been awarded the contract. *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed.Cir.1999).

Accordingly, the Secretary will review the agency's determination to determine whether there was a rational basis for its evaluation and whether the evaluation was consistent with applicable law. If the Secretary finds error, the Secretary will then examines whether the error was prejudicial to the protestor.

In its letter of protest, Oracle Elevator asserts that the bid of Abell Elevator should have been determined to be non-responsive since the bid provided for a response time of 1.5 days. The RFB provided “Bidders with response time greater than 4 hours shall be considered non-responsive to the solicitation.” RFB, Page 23 of 43. Here,

the bid of Abell Elevator stated a response time of 1.5 days. Accordingly, the Secretary finds that the bid of Abell Elevator, by the terms of the RFB, was non-responsive. It is not lost on the Secretary, that the form used by DECA was inaccurate as it referred to "days" when the prior language of the RFB clearly noted that the response should be made in "hours."

However, DECA requested that Abell Elevator, pursuant to 200 KAR 5:306(3), provide a clarification of its response time. Abell Elevator provided the following statement: "1.5" bid in the response time on page 23 of the original bid document means 1.5 hours in lieu of the 1.5 days. DECA accepted this statement as a clarification.

KRS 45A.080(6) provides: Correction or withdrawal of bids shall be allowed only to the extent permitted by regulations issued by the secretary. The implementing regulation, 200 KAR 306(3), provides:

The bids shall be examined by the purchasing officer responsible for the procurement for any clerical or technical errors, reviewed for technical compliance with the terms of the solicitation, and the supplies or services bid evaluated for conformity with the specifications contained in the solicitation. A bidder shall, if requested by the purchasing officer responsible for the procurement, clarify, in the format specified by the purchasing officer, any matter contained in the submitted bid about which the purchasing officer has question or believes in good faith needs to be clarified. The bid of any bidder who fails or refuses, within a reasonable time, to give a clarification, if requested to do so by the purchasing officer, shall not be considered further for an award on the basis of that solicitation. The clarification shall be incorporated in any contract awarded on the basis of that bid. After a reasonable bid evaluation period, the contract shall be awarded to the responsive and responsible bidder whose bid offers the best value to the Commonwealth. After evaluation of the bids, including consideration of any clarifying information submitted, the purchasing officer may determine that no satisfactory bid has been received and all bids may be disqualified. At the discretion of the purchasing officer, the solicitation may be cancelled and new bids solicited on the basis of the same or revised specifications, or competitive negotiations undertaken for the procurement. The basis for the disqualification of all bids and subsequent action taken or to be taken with respect to the solicitation shall be recorded and filed in the solicitation file relating to the procurement.

In order to be a clarification under 200 KAR 306(3), there needs to be an ambiguity in the bid response. Further, the clarification may not materially change the vendor's bid nor provide a competitive advantage by materially altering a price, quantity, quality, or time/delivery term. *See* 200 KAR 5:306(4) (An agency may waive minor irregularities in a bid only if the waiver does not provide the bidder with a competitive advantage).

In this case, the Secretary finds that the response time of Abell Elevator was not ambiguous on the bid document. The bid document clearly shows a response time of 1.5 days. The three other bidders were able to correctly complete the form. A "clarification" of a bid response time from 1.5 *days* to 1.5 *hours* would materially change the bid of Abell Elevator and provide Abell Elevator with a competitive advantage. The Secretary, therefore, finds that the determination to allow Abell Elevator to clarify its bid was arbitrary, capricious, or contrary to law.

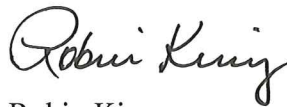
The Secretary also finds that Oracle Elevator has demonstrated prejudice: Oracle Elevator was the second highest evaluated bidder. Had Abell Elevator's bid been deemed non-responsive, Oracle Elevator would have been awarded the contract.

Accordingly, upon review of the record, Oracle Elevator has demonstrated an error in the procurement and prejudice. The protest, therefore, must be **SUSTAINED**. DECA is directed to rescind the award to Abell Elevator and to re-evaluate the bids in accordance with the terms of the RFB. Pursuant to KRS 45A.280:

The decision of any official, board, agent, or other person appointed by the Commonwealth concerning any controversy arising under, or in connection with, the solicitation or award of a contract, shall be entitled to a presumption of correctness and shall not be disturbed unless the decision was procured by fraud or the findings of fact by such official, board, agent or other person do not support the decision.

In accordance with KRS 45A.285 (4), the decision by Finance Cabinet shall be final and conclusive.

For the Secretary
Finance and Administration Cabinet
By Designation

A handwritten signature in black ink, appearing to read "Robin Kinney".

Robin Kinney
Executive Director
Office of Administrative Services

cc: Glen Bumpous, DECA
Tom Austin, Abell Elevator